
Sajad Ahmad Ganai Vs State Of Jammu & Kashmir And Anr

Habeas Corpus Petition (HCP) No. 401 Of 2018

Court: Jammu & Kashmir High Court (Srinagar Bench)

Date of Decision: March 1, 2019

Acts Referred:

Jammu & Kashmir Public Safety Act, 1978 & Section 8, 13#Constitution Of India, 1950 & Article 22(5)

Hon'ble Judges: Rashid Ali Dar, J

Bench: Single Bench

Advocate: B. A. Tak, Asif Maqboo, Sheikh Feroz

Judgement

1) By the instant petition, petitioner has sought quashment of the order of detention bearing No.24/DMB/PSA of 2018 dated 08.10.2018. In terms of

said order, the person of Sajad Ahmad Ganai (hereinafter referred to as the detainee), has been taken into preventive detention by invoking powers

under Section 8 of the J&K Public Safety Act.

2) The detention order has been challenged, mainly, on the grounds that the detaining authority has failed to apply its mind to the fact whether the

preventive detention of the detainee was imperative notwithstanding the fact that he was already in custody. To this, it has been added that the

respondent No.2 has passed the order of detention on the dictates of the sponsoring agency i.e. the officer who has prepared the police dossier and no

attempt has been made by respondent No.2 to scan and evaluate it before passing the order of detention.

3) Counter has filed by the respondents wherein it is stated that the relevant material has been furnished to the detainee. The detaining authority has

complied with the requirements of law. The detainee has failed to avail the remedy prescribed under the Act. He has not filed the representation

against the orders of detention. The detainee is involved in number of criminal cases. Order of detention has been passed on justifiable grounds.

Detention record has been produced to lend support the stand taken in the counter affidavit.

4) Heard learned counsel for the parties and also perused the records.

5) The main plank of argument of the learned counsel for the petitioner is that the since the detainee was in custody of the police authorities, therefore,

there was no need to direct his preventive detention. The arrest of the detainee in the said criminal cases at the time of passing of the orders of

detention has not been disputed.

6) Perusal of the detention records reveals that has been shown involved in FIR No.23/2018 registered at Police Station Aragam and FIR No.58/2018

P/S Bandipora. The arrest of the detention in connection with aforesaid criminal cases, at the time of passing of impugned order of detention, has not

been disputed by the respondents in the counter affidavit. Since the detainee was in the custody of the police at the time of passing of the order of

detention, therefore, question arises for consideration whether an order of detention could be passed on the face of such an eventuality?

The answer to this question is emphatically "No", taking into consideration the law laid down by the Hon'ble Apex Court in "Sama Aruna

v. State of Telangana & Anr" (AIR 2017 SC 2662). Para 24 of the said judgment is apposite to be quoted herein below:

"24. There is another reason why the detention order is unjustified. It was passed when the accused was in jail in Crime No.221 of 2016. His

custody in jail for the said offence was converted into custody under the impugned detention order. The incident involved in this offence is sometime in

the year 2002-03. The detainee could not have been detained preventively by taking this stale incident into account, more so when he was in jail. In

Ramesh Yadav v. District Magistrate, Etah and ors, this Court observed as follows:

"6. On a reading of the grounds, particularly the paragraph which we have extracted above, it is clear that the order of detention was passed as the

detaining authority was apprehensive that in case the detainee was released on bail he would again carry on his criminal activities in the area. If the

apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the

higher forum had to be raised. Merely on the ground that an accused in detention as an under trial prisoner was likely to get bail an order of detention

under the National Security Act should not ordinarily be passed."

7) The same view has been repeated and reiterated by the Hon'ble Supreme Court in the judgment delivered in the case of "V. Shantha v.

State of Telangana & Others" (AIR 2017 SC 2625). Para 13 of the said judgment is relevant to be quoted as under:

"The order of preventive detention passed against the detainee states that his illegal activities were causing danger to poor and small farmers and

their safety and financial well-being. Recourse to normal legal procedure would be time consuming and would not be an effective deterrent to prevent

the detainee from indulging in further prejudicial activities in the business of spurious seeds, affecting maintenance of public order and that there was

no other option except to invoke the provisions of the preventive detention Act as an extreme measure to insulate the society from his evil deeds. The

rhetorical incantation of the words "goonda" or "prejudicial to maintenance of public order" cannot be sufficient justification to invoke the

draconian powers of preventive detention. To classify the detainee as a "goonda" affecting public order because of inadequately yield from the

chilli seed sol by him and prevent him from moving for bail even is a gross abuse of the statutory power of preventive detention. The grounds of

detention are ex-facie extraneous to the Act.

8) Testing the instant case on the touchstone of the law laid down above, the detainee could not have been detained after taking recourse to the

provisions of the Public Safety Act when he was already in the custody of the police authorities in the cases, the details whereof have been given in

the grounds of detention. His custody in police for the offences referred in the grounds of detention, has been converted into the custody under the

impugned detention order. May be the detaining authority might have been laboring under the belief that the detainee applies for bail, he may succeed

in seeking his release but this apprehension of the detaining authority could have been guarded against by resisting and opposing the bail application. In

the event of his release on bail, the State could have exercised its right to knock at the doors of higher forum. This single infraction knocks the bottom

out of the contention raised by the State that the detainee can be detained preventatively when he is already in custody and has not applied for bail. It

cuts the very root of the State act. The State could have taken recourse to the ordinary law of the land.

9) The learned counsel for the detainee has also argued that the Officer, who handed over the detainee to the concerned jail authorities of Central Jail

along with the relevant documents, should have filed an affidavit in the matter indicating the fact that he has explained the grounds of detention to the

detainee in the language which he understood, which has not been done.

10) The submission appears to be forceful as nothing has been brought on record to show that the contents of grounds of detention were read over to

the detainee in Kashmiri language, which language he understood fully. To eradicate all the doubts, it was incumbent on the part of the person, who did

the exercise of handing over the documents and conveying the contents thereof to the detainee, to file an affidavit in order to attach a semblance of

fairness to his actions. Resort can, in this behalf, be had to the law laid down by the Apex Court of the country in the case of "State Legal Aid

Committee, J&K versus State of J&K & others, reported in AIR 2005 SC 1270, wherein it has been held as under:

Though several questions have been raised in this petition, it is not necessary to deal with them in detail as we find that there is no definite material to

show that the requirements of Section 13 of the Jammu & Kashmir Public Safety Act, 1978, (in short the Act), requiring the grounds of order of

detention to be disclosed/ communicated to the person affected by the order has been complied with. Though in the affidavit filed by the State, it has

been stated that the contents of the warrants and grounds of detention were served, read over and explained to the assessee and he was informed

about his right to make a representation against the detention, if he so desired, there is no material placed on record to substantiate this stand. It is

stated in the affidavit that the detenu refused to receive copy of the detention order and also refused to put his signatures on the documents. The

least the State could have done is to file an affidavit of the person who wanted to serve the relevant documents and an endorsement LPA (HC)

107/2017 10 of 16 to the effect that there was refusal. Even the name of the official has not been indicated in the affidavit. That would have been

sufficient to comply with the requirements of Section 13 of the Act.

11) Para 20 of the judgment rendered in the case of Lallubhai Jogibhai Patel vs Union Of India & Ors reported in 1981 AIR 72,8 shall also be

advantageous to be quoted:

“20. It is an admitted position that the detenu does not know English. The grounds of detention, which were served on the detenu, have been drawn

up in English. It is true that Shri C. L. Antali, Police Inspector, who served the grounds of detention on the detenu, has filed an affidavit stating that he

had fully explained the grounds of detention in Gujarati to the detenu. But, that is not a sufficient compliance with the mandate of Article 22(5) of the

Constitution, which requires that the grounds of detention must be “communicated” to the detenu. “Communicate” is a strong word.

It means that sufficient knowledge of the basic facts constituting the 'grounds' should be imparted effectively and fully to the detenu in writing in a

language which he understands. The whole purpose of communicating the 'ground' to the detenu is to enable him to make a purposeful and effective

representation. If the 'grounds' are only verbally explained to the detenu and nothing in writing is left with him, in a language which he understands,

then that purpose is not served, and the constitutional mandate in Article 22(5) is infringed. If any authority is needed on this point, which is so obvious

from Article 22(5), reference may be made to the decisions of this Court in *Harikishan v. State of Maharashtra*: and *Haribandhu Dass. v. District*

Magistrate (AIR 1969 SC 43) (ibid).“

12) Life and liberty of the citizens are of paramount importance. A duty is cast on the shoulders of the Court to enquire that the decision of the

Executive is made upon the matters laid down by the Statute and that these are relevant for arriving at such a decision. A citizen cannot be deprived

of personal liberty guaranteed to him/her by the Constitution and of which, he/she cannot be deprived except in due course of law.

13) Having regard to the above discussion, the impugned order of detention orders of detention bearing No. 24/DMB/PSA of 2018 dated 08.10.2018

being unsustainable, as such, quashed. Further custody of the detenu shall be governed in accordance with the orders as shall be passed by the court

of competent jurisdiction in the criminal cases registered against him.

14) Registry to return the detention records to the learned counsel for the respondents.